

LEGISLATURE OF NEBRASKA
NINETY-SEVENTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 544

Introduced by Connealy, 16

Read first time January 11, 2001

Committee: Banking, Commerce and Insurance

A BILL

- 1 FOR AN ACT relating to economic development; to adopt the Capital
- 2 Access Program Act; and to create a fund.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 24 of this act shall be known
2 and may be cited as the Capital Access Program Act.

3 Sec. 2. For purposes of the Capital Access Program Act:

4 (1) Agreement means an agreement between a lender and the
5 department under which a lender may participate in the program;

6 (2) Borrower means the recipient of a loan that is, has
7 been, or will be filed by the lender for enrollment under the
8 program;

9 (3) Claim means a claim filed by the lender under section
10 19 of this act;

11 (4) Department means the Department of Economic
12 Development;

13 (5) Early loan means an enrolled loan when at the time of
14 enrollment the aggregate amount of previously enrolled loans made
15 by the lender under the program was less than five million dollars;

16 (6) Eligible loan means a loan made by a lender to a
17 borrower that meets the requirements of sections 7 and 8 of this
18 act;

19 (7) Enrolled loan means a loan enrolled under section 9
20 of this act;

21 (8) Fund means the capital access fund created under
22 section 3 of this act to carry out the purposes of the program;

23 (9) Lender means any state-chartered or
24 federally-chartered bank which has a main-chartered office or
25 branch in this state or any state-chartered building and loan
26 association, federal savings and loan association, federal savings
27 bank, or state-chartered savings bank which has a main-chartered
28 office in this state;

1 (10) Passive real estate ownership means ownership of
2 real estate for the purpose of deriving income from speculation,
3 trade, or rentals, except that the passive real estate ownership
4 does not include the following:

5 (a) Ownership of that part of real estate being used or
6 intended to be used for the operation of the business of the owner
7 of the real estate; and

8 (b) Ownership of real estate for the purpose of
9 construction or renovation until the completion of the construction
10 or renovation;

11 (11) Program refers to the capital access program
12 established in section 3 of this act; and

13 (12) Reserve fund account means an account established by
14 the department within the fund with money accumulated under the act
15 to cover claims.

16 Sec. 3. (1) The capital access program is established.
17 The purpose of the program is to provide capital to businesses,
18 particularly small and medium-sized businesses, to foster economic
19 development in Nebraska. Loans made under the program are to be
20 slightly riskier than conventional loans but still offer a high
21 degree of soundness in connection with the program.

22 (2) The capital access fund is created. The department
23 shall use the fund to carry out the purposes of the program. The
24 fund shall consist of all money appropriated to it by the
25 Legislature. Any money in the fund available for investment shall
26 be invested by the state investment officer pursuant to the
27 Nebraska Capital Expansion Act and the Nebraska State Funds
28 Investment Act.

1 Sec. 4. The department shall:

2 (1) Administer the program;

3 (2) Market the program to potential borrowers in Nebraska
4 in cooperation with lenders and statewide associations representing
5 lenders;

6 (3)(a) If a reserve fund account is not maintained in an
7 account with the lender, upon execution of an agreement between the
8 lender and the department, establish a reserve fund account for the
9 lender for the purpose of receiving all required premium charges to
10 be paid by the lender and the borrower and transfers made by the
11 department under the Capital Access Program Act.

12 (b) If a reserve fund account is maintained in an account
13 with the lender, upon execution of an agreement between the lender
14 and the department, establish a reserve fund account with the
15 lender in the name of the department for the purpose of receiving
16 all required premium charges to be paid by the lender and the
17 borrower and transfers made by the department under the act. Such
18 premium charges are nonrefundable;

19 (4) Develop the program, in cooperation with lenders and
20 statewide associations representing lenders, so that the degree of
21 flexibility for the department and the participating lenders is
22 maximized, so that state government oversight of individual loans
23 is minimized, and so that the fiscal integrity of the program is
24 maintained;

25 (5) Enter into any contracts necessary to carry out the
26 program; and

27 (6) Take any action reasonably necessary to ensure
28 compliance with the program.

1 Sec. 5. A lender is eligible to participate in the
2 program upon entering into an agreement governing the duties of the
3 department and the lender under the program. The lender shall
4 provide the department with information regarding the lender's
5 participation in the program that the department reasonably
6 requires. Upon notice to the lender, the department may inspect
7 the files of the lender relating to any enrolled loans during the
8 normal business hours of the lender.

9 Sec. 6. Except upon the exercise of the department's
10 right of subrogation under section 22 of this act, the department
11 has no legal or equitable interest in any collateral, security, or
12 other right of recovery in connection with any enrolled loan, and
13 the department's consent is not necessary for any amendment to the
14 lender's loan documents.

15 Sec. 7. (1) The following types of loans are eligible
16 loans under the program:

17 (a) Loans for industrial, commercial, or agricultural
18 purposes;

19 (b) Loans to refinance loans made for the purposes in
20 subdivision (a) of this subsection; and

21 (c) Loans for line-of-credit arrangements established
22 between the lender and borrower that are used for the purposes in
23 subdivision (a) of this subsection.

24 (2) Eligible loans shall meet the following criteria:

25 (a) The lender has not made the loan to enroll in the
26 program prior debt that is not covered under the program and that
27 is or was owed by the borrower to the lender;

28 (b) The proceeds of the loan will not be used for that

1 part of a project or development devoted to housing;

2 (c) The proceeds of the loan will not be used to finance
3 passive real estate ownership; and

4 (d) The proceeds of the loan will be used to finance a
5 project or enterprise that is located in Nebraska and that will
6 foster economic development in Nebraska.

7 (3) An eligible loan may provide for an interest rate,
8 fees, and other terms and conditions agreed to by the lender and
9 borrower. If the amount to be borrowed is determined by a
10 commitment arrangement that establishes a line of credit, the
11 amount of the loan is the maximum amount available to the borrower
12 under the arrangement.

13 Sec. 8. (1) To enroll a loan under the program, the
14 lender shall file a completed loan enrollment form with the
15 department. The lender shall also certify the following to the
16 department as part of the filing:

17 (a) The lender has no substantial reason to believe that
18 the loan is being made to a borrower who does not meet the
19 following requirements:

20 (i) The borrower is a corporation, limited liability
21 company, partnership, joint venture, sole proprietorship,
22 cooperative, or other entity, whether profit or nonprofit, that is
23 authorized to conduct business in Nebraska; and

24 (ii) The borrower is not an executive officer, a
25 director, or a principal shareholder of the lender; a member of the
26 immediate family of an executive officer, a director, or a
27 principal shareholder of the lender; or an entity controlled by an
28 executive officer, a director, a principal shareholder, or a member

1 of the immediate family of the lender;

2 (b) The lender has received from the borrower a written
3 representation, warranty, pledge, and waiver stating that the
4 borrower has no legal, beneficial, or equitable interest in the
5 premium charges or any other funds credited to the reserve fund
6 account;

7 (c) The loan being filed for enrollment is an eligible
8 loan under section 7 of this act; and

9 (d) Premium charges required of the borrower and lender
10 have been deposited in the reserve fund account.

11 (2) The lender shall file the loan enrollment form within
12 ten business days after the lender makes the loan. The date on
13 which the lender makes a loan is the earlier of the date on which
14 the lender first disburses proceeds of the loan to the borrower or
15 the date on which the loan documents have been executed and the
16 lender has obligated itself to disburse proceeds of the loan.

17 Sec. 9. When the department receives a loan enrollment
18 form, the department shall enroll the loan if the information
19 provided under section 8 of this act indicates that the loan is an
20 eligible loan. Within five business days after receipt of a loan
21 enrollment form for an eligible loan, the department shall deliver
22 to the lender an acknowledgment of enrollment signed by the
23 department or the department's designee, including documentation of
24 the amount being transferred by the department into the reserve
25 fund account under the Capital Access Program Act.

26 Sec. 10. When filing a loan enrollment form, the lender
27 may specify an amount to be covered under the program. The amount
28 to be covered may be less than the total amount of the loan.

1 Sec. 11. (1) If a loan is made to refinance a loan
2 previously made to the borrower by the lender that was not enrolled
3 under the program, the lender may obtain coverage under the program
4 for an amount not exceeding the amount of additional financing
5 included in the refinancing loan.

6 (2) If an enrolled loan is refinanced and the total
7 amount to be covered under the program does not exceed the covered
8 amount of the loan as previously enrolled, the refinanced loan may
9 continue as an enrolled loan without payment of additional premium
10 charges or transfers by the department to the reserve fund account.

11 (3) If an enrolled loan is refinanced in an amount
12 exceeding the amount of the loan as previously enrolled, the lender
13 may obtain coverage of the amount of the refinanced loan that
14 exceeds the amount covered when the loan was previously enrolled by
15 refiling to enroll the loan under section 8 of this act.

16 (4) A fluctuation in the outstanding balance of a line of
17 credit, without increasing the amount of the enrolled loan, is not
18 a refinancing of the loan.

19 Sec. 12. (1) If the outstanding balance of an enrolled
20 loan that is not a line of credit is reduced to zero, the loan is
21 no longer an enrolled loan. If an enrolled loan that is a line of
22 credit has an outstanding balance of zero for a twelve-month
23 period, the line of credit is no longer an enrolled loan unless,
24 before the expiration of the twelve-month period, the lender
25 reaffirms in writing to the borrower that the line of credit will
26 remain open and the borrower acknowledges the reaffirmation in
27 writing.

28 (2) Notwithstanding subsection (1) of this section, any

1 amount recovered from a lender by a trustee in bankruptcy, or a
2 similar representative of creditors, as a preference under 11
3 U.S.C. 547, remains an enrolled loan for purposes of filing a claim
4 against the reserve fund account.

5 Sec. 13. Upon execution of an agreement, the department
6 shall establish a reserve fund account with the lender in the name
7 of the department for the purpose of receiving all required premium
8 charges to be paid by the lender and the borrower and transfers
9 made by the department under the Capital Access Program Act.

10 Sec. 14. The department shall not accept loans for
11 enrollment in the program if the department does not have
12 sufficient funds to make the necessary transfer from the department
13 to the reserve fund account under section 15 of this act.

14 Sec. 15. The lender shall determine the premium charges
15 payable to the reserve fund account by the lender and the borrower
16 in connection with a loan filed for enrollment. The premium paid
17 by the borrower shall be not less than one and one-half percent or
18 greater than three and one-half percent of the amount of the loan.
19 The premium paid by the lender shall be equal to the amount of the
20 premium paid by the borrower. The lender may recover the cost of
21 the lender's premium payment from the borrower in any manner on
22 which the lender and borrower agree. When enrolling a loan, the
23 department shall transfer into the reserve fund account from the
24 capital access fund premium match amounts determined as follows:

25 (1) If the amount of a loan, plus the amount of enrolled
26 loans previously enrolled by the lender, is less than two million
27 dollars, the premium match amount transferred shall be equal to one
28 hundred fifty percent of the combined premiums paid into the

1 reserve fund account by the borrower and the lender for each
2 enrolled loan;

3 (2) If, before the enrollment of the loan, the amount of
4 enrolled loans previously enrolled by the lender is equal to or
5 greater than two million dollars, the premium match amount
6 transferred shall be equal to the combined premiums paid into the
7 reserve fund account by the borrower and the lender for each
8 enrolled loan;

9 (3) If the aggregate amount of all enrolled loans
10 previously enrolled by the lender is less than two million dollars,
11 but the enrollment of a loan will cause the aggregate amount of all
12 enrolled loans made by the lender to exceed two million dollars,
13 the department shall transfer into the reserve fund account an
14 amount equal to a percentage of the combined premiums paid into the
15 reserve fund account by the lender and the borrower. The
16 percentage is determined as follows:

17 (a) Multiply by one hundred fifty that part of the loan
18 that when added to the aggregate amount of all loans previously
19 enrolled by the lender totals two million dollars;

20 (b) Multiply the remaining balance of the loan by one
21 hundred;

22 (c) Add the product under subdivision (a) of this
23 subdivision to the product under subdivision (b) of this
24 subdivision; and

25 (d) Divide the sum in subdivision (c) of this subdivision
26 by the total amount of the loan.

27 A maximum premium match amount of one hundred fifty
28 thousand dollars may be transferred into the reserve fund accounts

1 of all lenders participating in the program by the department over
2 any three-year period in connection with any one borrower or any
3 group of borrowers among which a common enterprise, as described in
4 12 C.F.R. 32.5, exists. This maximum premium match amount may be
5 exceeded upon written request by a lender only if the department
6 approves in writing the transfer of an amount in excess of one
7 hundred fifty thousand dollars.

8 Sec. 16. (1) All money credited to the reserve fund
9 account is under the exclusive control of the department. The
10 department shall not withdraw money from the reserve fund account
11 except as specifically provided in the Capital Access Program Act.

12 (2) If money in the reserve fund account is not deposited
13 by the department in an account with the lender, the money shall be
14 invested or reinvested by the department in one of the following:

15 (a) Direct obligations of the United States, the
16 principal and interest of which are unconditionally guaranteed by
17 the United States; or

18 (b) A deposit account at a depository institution whose
19 deposits are insured by the Federal Deposit Insurance Corporation.

20 (3) All interest earned in a reserve fund account shall
21 be credited to that account. Fifty percent of the interest earned
22 may be withdrawn by the department from that account and used for
23 any purpose.

24 Sec. 17. The department shall pledge the following to
25 the lender:

26 (1) The money in the reserve fund account will be
27 available to pay claims;

28 (2) The lender will have a first security interest in the

1 money in the reserve fund account to pay the lender's claims; and

2 (3) The department will not encumber or pledge the money
3 in the reserve fund account to any other party.

4 Sec. 18. (1) If the reserve fund account is not
5 maintained with the lender, the department shall provide to the
6 lender quarterly transaction reports indicating the following:

7 (a) The balance in the reserve fund account;

8 (b) Payments and transfers into the reserve fund account;

9 (c) Withdrawals from the reserve fund account; and

10 (d) Interest or income earned on money credited to the
11 reserve fund account.

12 (2) The records of the department with respect to all
13 payments and transfers into the reserve fund account, withdrawals
14 from the reserve fund account, and interest on income earned on the
15 money credited to the reserve fund account, shall be available to
16 the lender at the offices of the department during normal business
17 hours.

18 Sec. 19. (1) If a lender charges off all or part of an
19 enrolled loan, the lender may file a claim with the department.
20 The claim shall be filed contemporaneously with the charge-off.

21 (2) The lender's claim may include, in addition to the
22 amount of principal charged off plus accrued interest, one-half of
23 the reasonable documented out-of-pocket expenses incurred in
24 pursuing collection efforts, including preservation of collateral.
25 The amount of principal included in the claim shall not exceed the
26 principal amount covered under the program. The amount of accrued
27 interest included in the claim shall not exceed the accrued
28 interest attributable to the covered principal amount.

1 (3) The lender shall determine when and how much to
2 charge off on an enrolled loan in a manner consistent with the
3 lender's normal method for making these determinations on similar
4 loans that are not enrolled loans.

5 (4) If the lender files two or more claims
6 contemporaneously and there are insufficient funds in the reserve
7 fund account at that time to cover the entire amount of the claims,
8 the lender may designate the order of priority in which the
9 department pays the claims.

10 Sec. 20. (1) Upon receipt by the department of a claim,
11 the department shall, within ten business days, pay or authorize
12 the lender to withdraw from the reserve fund account the amount of
13 the claim as submitted unless the department reasonably determines
14 that:

15 (a) The information provided by the lender to the
16 department under the Capital Access Program Act was known by the
17 lender to be false; or

18 (b) The lender is not otherwise in substantial compliance
19 with the act or with the agreement.

20 (2) If there is insufficient money in the reserve fund
21 account to cover the entire amount of the lender's claim, the
22 department shall pay to the lender or authorize the lender to
23 withdraw an amount equal to the current balance in the reserve fund
24 account, and the following apply:

25 (a) If the enrolled loan for which the claim has been
26 filed is not an early loan, the payment fully satisfies the claim,
27 and the lender has no right to receive any further amount from the
28 reserve fund account with respect to that claim; and

1 (b) If the enrolled loan for which the claim has been
2 filed is an early loan, the department, upon request of the lender,
3 shall, out of any future funds that are transferred into the
4 reserve fund account on subsequently enrolled loans, pay the
5 remaining balance of the claim upon finding that:

6 (i) The partial payment has not satisfied the lender's
7 claim; and

8 (ii) The remaining balance of the claim is not greater
9 than seventy-five percent of the balance in the reserve fund
10 account at the time the request for payment by the lender is
11 received by the department.

12 Sec. 21. If, subsequent to payment of a claim by the
13 department, the lender recovers from a borrower any amount for
14 which payment of the claim was made, the following apply:

15 (1) If the recovered amount plus the claim previously
16 paid by the department in connection with an enrolled loan, exceeds
17 the lender's loss on that enrolled loan, the lender shall promptly
18 pay to the department for deposit in the reserve fund account the
19 amount of the excess; and

20 (2) For purposes of this section and section 22 of this
21 act, the lender's loss on an enrolled loan shall be the amount of
22 principal charged off by the lender, plus accrued interest, plus
23 one-half of the reasonable and documented out-of-pocket expenses
24 incurred by the lender in pursuing collection efforts.

25 Sec. 22. (1) If the payment of a claim has fully covered
26 the lender's loss on an enrolled loan or if the payment of a claim
27 when combined with any recovery from the borrower has fully covered
28 the lender's loss, the department, upon request, is subrogated to

1 the rights of the lender with respect to any collateral, security,
2 or other right of recovery in connection with the loan that has not
3 been realized by the lender. The lender thereafter shall assign to
4 the department any right, title, or interest to any collateral,
5 security, or other right of recovery in connection with the loan.

6 (2) If a subrogation has been made under subsection (1)
7 of this section, the department is not required to undertake the
8 obligations of the lender under the lender's loan documents, except
9 for obligations directly related to the department's subrogated
10 rights of recovery in connection with the loan. The lender shall
11 fulfill any other obligations the lender has under the loan
12 documents in the same manner and to the same degree as would be
13 required if the subrogation had not been made. The lender shall
14 provide the department with all reasonable assistance the
15 department requests in proceeding with respect to any collateral,
16 security, or other right of recovery, except that the lender does
17 not need to incur any out-of-pocket expenses.

18 (3) If the department desires to exercise the right of
19 subrogation in connection with an enrolled loan, and would be
20 entitled to exercise that right except that the lender's loss has
21 not been fully covered, the department, at the department's option,
22 may pay from funds in the reserve fund account an amount sufficient
23 to result in the lender's loss being fully covered. A payment
24 under this subsection may cover a principal amount not covered
25 under the program or not included in the lender's claim. Upon
26 making a payment under this subsection, the department is
27 subrogated to the rights of the lender in accordance with
28 subsection (1) of this section.

1 (4) Notwithstanding any other provision of this section,
2 the department shall not exercise the right of subrogation unless
3 the department determines, in its discretion, that the lender has
4 not exercised reasonable care and diligence in collection
5 activities with respect to the loan, or that there is a reasonable
6 basis for believing that the lender will not exercise reasonable
7 care and diligence in the future with respect to those collection
8 activities.

9 Sec. 23. (1) The lender shall file quarterly reports
10 with the department indicating the number and aggregate outstanding
11 balances of all enrolled loans for the preceding calendar quarter.
12 A quarterly report is not required for a quarter that ends with a
13 balance in the reserve fund account of zero, except that a year-end
14 report shall be filed before July 31 for the preceding twelve
15 calendar months ending June 30. In computing the aggregate
16 outstanding balance of all enrolled loans, the balance of a loan
17 shall not be greater than the covered amount of the enrolled loan.

18 (2) If a year-end report filed under this section
19 indicates that, for the immediately preceding twelve-calendar-month
20 period ending June 30, the balance in the reserve fund account
21 continuously exceeded fifty percent of the aggregate outstanding
22 balance of all enrolled loans, including unfunded portions of
23 enrolled loans that are lines of credit, the department shall
24 transfer such excess money to the capital access fund. The amount
25 of the transfer shall not be greater than the minimum amount of any
26 excess as continuously maintained over the immediately preceding
27 twelve-calendar-month period ending June 30.

28 (3) If a year-end report is not filed within thirty days

1 after the original due date of the report, the department may make
2 a transfer from the reserve fund account based on the department's
3 determination from an inspection of the lender's files that, for
4 the immediately preceding twelve-calendar-month period ending June
5 30, the balance in the reserve fund account continuously exceeded
6 fifty percent of the aggregate outstanding balance of all enrolled
7 loans, including unfunded portions of enrolled loans that are lines
8 of credit. The amount of the transfer shall not be greater than
9 the minimum amount of any excess as continuously maintained over
10 the immediately preceding twelve-calendar-month period ending June
11 30.

12 (4) The right of the department to make a withdrawal from
13 the reserve fund account under subsection (2) or (3) of this
14 section is subject to the following provisions:

15 (a) If a year-end report is filed by July 31 or not more
16 than thirty days after July 31, the department has the right of
17 withdrawal for a period of ninety days after the date of the filing
18 of the report with the department; and

19 (b) If a year-end report is not filed by July 31 or not
20 more than thirty days after July 31, the department has the right
21 of withdrawal for a period of ninety days from the date the
22 department determines from an inspection of the lender's files that
23 the department is entitled to make a withdrawal from the reserve
24 fund account under this section.

25 Sec. 24. The department may terminate the obligation to
26 a lender to enroll loans under the program if the department
27 determines that the lender is not in substantial compliance with
28 the requirements of the program or with the written agreement. The

1 termination takes effect on the date specified in the notice of
2 termination, except that the termination does not apply to a loan
3 made on or before the date on which the notice of termination is
4 received by the lender. If the department is terminating the
5 enrollment of loans for all participating lenders under the
6 program, the department shall provide at least ninety days' notice
7 to each lender. A termination under this section is prospective
8 only and does not apply to an enrolled loan previously refinanced.
9 After termination, the amount covered under the program shall not
10 be increased beyond the covered amount as previously enrolled.